Supreme Court, U.S.
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No. 09A

In The

Supreme Court of the United States

WILLIAM C. BROWN,

Petitioner,

v.

PROGRESS ENERGY

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Civil Rights Act of 1866 (42 U.S.C. § 1981) states that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts... as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." This statute defines "Make and enforce contracts" as "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

The question presented is:

Does the word "nigger" when directed at an African American, who is in private employment, deprive him or her of the right to make and enforce contracts as is enjoyed by white citizens?

LIST OF PARTIES

Petitioner, pursuant to Rule 14, states that the parties below are listed in the caption.

In addition, the United States Equal Employment Opportunity Commission appeared as *amicus curiae* in support of the petitioner William Brown before the Eleventh Circuit Court of Appeals

CORPORATE DISCLOSURE STATEMENT

Petitioner, pursuant to Rule 29.6, states that the Respondent, Progress Energy, is a private for-profit corporation with no parent or publicly held company owning 10% or more of the corporation's stock being listed on Florida Department of State Document # F04000000179, 2010 For Profit Corporation Annual Report.

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OPINION BELOW

The initial opinion of the United States Court of Appeals for the Eleventh Circuit is reported as a non-published decision on the website of the Eleventh Circuit Court of Appeals, Case No. 09-11079. The Eleventh Circuit affirmed the decision of the United States District Court for the Middle District of Florida, on February 4, 2010.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit, affirming the decision of the district court's summary judgment order in favor of the Respondent, was handed down on February 4, 2010. This Court's jurisdiction in invoked under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment Thirteen, United States Constitution

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Title 42 United States Code,
Section 1981

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security
of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

1. The Petitioner, who is a black American, was the only black man on a ten-man crew during his apprenticeship training. A senior white lineman, who was assigned to train the Petitioner, referred to the Petitioner as a "nigger" on five or more occasions while

outside of the Petitioner's presence, and otherwise racially discriminated against the Petitioner during the course of his training. The Petitioner, notwithstanding, was promoted to a regular lineman but nevertheless alleges that he has sustained non-economic emotional pain damages stemming from the racial slur "nigger" and other disparate treatment during his apprenticeship training.

2. Progress Energy knew or should have known about the usage of the racial denunciation "nigger" and racially-discriminatory apprenticeship training but took no corrective action. The cumulative effect of Progress Energy's failing to take corrective action was a racially hostile work environment, an inferior race-based apprenticeship training, and Brown's psychological discomfort.

3. Progress Energy thus evaded § 1981's mandate to allow the Petitioner to perform his employment contract in the same manner as was performed by his fellow white lineman apprentices. The key phrase in § 1981 is "as is enjoyed by white citizens." In common American English, the word "enjoy" means "1 to get joy or pleasure from.... 2 to have the use of or have as a benefit... -- to have a good time; have fun."[1] According to *Barron's Law Dictionary*, the word "enjoyment" means "substantial present economic benefit. It refers to beneficial use, interest, and purpose to which real or personal property may be put and implies rights, profits, and

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[1] *Webster's New World Basic Dictionary of American English* (Cleveland, OH: Wiley Publishing Co., 1998), p. 286.

income therefrom, rather than a technical vesting of title.... In common usage, it is synonymous with 'use' and 'occupancy,' and usually implies possession."[2] And, finally, according to *Black's Law Dictionary* (7th Edition), the word "enjoy" means "[t]o have, possess, and use (something) with satisfaction; to occupy or have the benefit of (property)."[3]

"Nigger," when uttered in its historical context, can easily impair a black American worker's right to the "equal enjoyment" of an employment contract. (A "nigger," in its historic context, was always something that no African American wanted to be in the South, particularly during the antebellum era or during the pre-civil rights era.) The reason is that "nigger" constitutes wholesale racial defamation (both libel and slander), because it attributes very degrading personal and racial characteristics to African Americans. Historically, when "nigger" was applied to black women, it meant, inter alia, that they were lascivious, ignorant, loud, musical, happy-go-lucky, lovers of watermelon, obnoxious, sexually illicit, and lazy; and when "nigger" was applied to black men, it meant, inter alia, that they were criminal-prone, ignorant, unusually lustful towards white women (i.e., rapists), thieves, lovers of watermelon, musical, loud, lazy, happy-go-lucky, etc. Hence, this *wholesale racial defamation* both signified and justified racial segregation, lynching[4], and whites' disassociation with,

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[2] *Barron's Law Dictionary* (Hauppauge, NY: Barron's Educational Series, 1996), p. 168.

[3] *Black's Law Dictionary* (St. Paul, MN: West Group, 1999), p. 550.

[4] See, generally, Ralph Ginsburg, *One Hundred Years of Lynchings* (Baltimore, MD: Black Classic Books, 1988), pp. 9-252.

and aversion to, African Americans. "Nigger," without question, when used in its historic context, constitutes wholesale racial defamation.[5] To be sure, the modern era of comedic entertainment and popular music has defaced the potency of "nigger" in our society. Indeed, "[g]iven the protean character of *nigger*, which may signal several different (even contradictory) meanings, it is probably erroneous to conclude that the word itself necessarily furnishes proof of racial discrimination, even when the speaker is white and the target black."[6] In other words, "nigger" has taken on varied meanings outside of its historic usage.[7]

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[5] Restatement (Second), Torts § 559, defines defamation as "[a] communication [which]...tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." The Comment to § 559 states that "[c]ommunications are often defamatory because they tend to expose another to hatred, ridicule or contempt. A defamatory communication may tend to disparage another by reflecting unfavorably upon his personal morality or integrity...."

[6] Randall Kennedy, *Nigger: The Strange Career of a Troublesome Word*, (New York: Vintage Books, 2002), p. 75.

[7] The "historic usage" of "nigger" is displayed in Professor Kennedy's book *Nigger: The Strange Career of a Troublesome Word*, in which he writes: "Given whites' use of nigger, it should come as no surprise that for many blacks the N-word has constituted a major and menacing presence that has sometimes shifted the course of their lives. Former slaves featured it in their memoirs about bondage. Recalling her lecherous master's refusal to permit her to marry a free man of color, Harriet Jacobs related the following colloquy: 'So you want to be married do you?' he said, 'and to a free nigger.'

"'Yes, sir.'

"'Well, I'll soon convince you whether I am your master, or the nigger fellow you honor so highly. If you must have a husband, you may take up with one of my slaves.'

Nevertheless, the Thirteenth Amendment and § 1981 continue to regulate racial harassment and discrimination in private employment. "Nigger," when used in its historical context, is defamation. Defamation is a common law tort; common law torts, when committed because of race, falls within the jurisdiction of § 1981.[8] Thus, the task of the jury and

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"Nigger figures noticeably, too, in Frederick Douglass's autobiography. Re-creating the scene in which his master objected to his being taught to read and write, the great abolitionist imagined that the man might have said, 'If you give a nigger an inch he will take an ell. A nigger should know nothing but to obey his master.... Learning would spoil the best nigger in the world.' In the years since the Civil War, no one has more searingly dramatized nigger-as-insult than Richard Wright. Anyone who wants to learn in a brief compass what lies behind African American anger and anguish when nigger is deployed as a slur by whites should read Wright's *The Ethics of Living Jim Crow*.... Wright narrated [a confrontation at work]...:

"'What yuh tryin' t' do, nigger, git smart?' he asked.

"'Naw; I ain't tryin' t' git smart,' I said. "'Well, don't, if yuh know what's good for yuh!... Nigger, you think you're white, don't you?'

"'No sir!'

"'This is white man's work around here, and you better watch yourself.'"

Randal Kennedy, *Nigger: The Strange Career of a Troublesome Word* (New York: Vintage Books, 2002), pp. 10-11.

Hence, the Supreme Court should state in no uncertain terms that the word "nigger" is a racially violent term that violates Section 1981 and offends the Thirteenth Amendment since it constitutes a "badge and incident of slavery."

[8] See, e.g., *Mendez v. Rutherford*, 687 F. Supp. 412, 415-416 (N.D. Ill. 1988)("Racially-motivated arrests, beatings and searches made in the absence of probable cause easily fall within the wording of § 1981"); *Folkerson v. Circus Circus Enterprises, Inc.*, 68 F.3d 480 (9th Cir. 1995)("In its more severe forms, sexual or

the court is to ascertain whether "nigger," if uttered in the workplace, was used in its historic, defamatory context.

If a reasonable jury can determine that "nigger" was used in its historic, defamatory context, then may it also reasonably determine that such usage impairs the "equal enjoyment" of the employment contract, and is thus sufficiently severe to create disparate treatment and a hostile working environment?

In Florida, as in all states, the employment relationship is a contractual one. This contractual relationship involves a series of reciprocal obligations and duties between the employee and the employer. For instance, an employee owes to the employer an implied duty to perform skillfully, carefully, diligently, and in a workmanlike manner.[9] An employee's failure to comply with this implied duty to perform in a skillful and workmanlike manner may entitle the employer to damages.[10] Conversely, an employer owes to an employee the general obligation to, inter alia:

1. provide a sufficient number of competent fellow servants so that the conditions of employment are not unreasonably dangerous[11];

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racial harassment can involve violence.... Reasonable defense against physical violence may be protected activity.")

[9] 17A Am Jur 2d , Contracts § 612; 2 Fla Jur, Agency and Employment § 80

[10] Id.

[11] Restatement (Second), Agency § 505 ("The master has a non-delegable duty of care to select, and to retain in his employ, only servants from whose conduct there is not an unreasonable risk of

2. plan the work that the servants employed therein are not subjected to unreasonable risks[12];

3. supply competent supervisors of the operative details of the business where this is reasonably necessary to prevent undue risk of harm to his servants in the performance of such details[13];

4. give such instruction to employees employed by the employer as, from what the employer should know concerning them and the work they are employed to do, is necessary to prevent unreasonable risk to them and to other servants during the progress of the work, and to give them work suitable to their apparent capacities[14]; and

5. protect employees against assaults, batteries or other torts which are clearly based on race, sex, national origin, religion, or color.[15]

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harm to other servants; and he has a similar duty to employ sufficient servants so that the work may be done without unreasonable risk to them.").

[12] Restatement (Second), Agency § 506.

[13] Restatement (Second), Agency § 507.

[14] Restatement (Second), Agency § 510.

[15] See, also, *Folkerson v. Circus Circus Enterprises, Inc.*, 68 F.3d 480, 481 (Table)(9th Cir. 1995). In *Folkerson*, the court stated, "Circus Circus asserts that physical violence can never constitute protected opposition to unlawful discrimination. However, the company provides absolutely no support for this claim. In its more severe forms, sexual or racial harassment can involve violence. In the criminal law context, the doctrine of self defense has developed precisely because society deems it reasonable for individuals to defend themselves against violent attacks. 'It is only just that one who is unlawfully attacked by another, and who has no opportunity to resort to the law for his defense, should be able to take reasonable steps to defend himself from physical harm.' 1 Wayne R. LaFave and Austin W. Scott, Jr., Substantive Criminal Law § 5.7(a)(1986). Because individuals may take

When "nigger" is defamatory, it deprives employees of equal contractual rights because of their race.

"Nigger," when directed at a black American employee, can detract from his or her ability to perform skillfully, carefully, diligently, and in a workmanlike manner, since "nigger," if clearly used in its historic context, can impair his or her emotional tranquility while at work. Whether the unabated usage of "nigger" breaches an employers' legal duties and obligations to any American worker -- regardless of his or her race-- who is called that term, turns on whether society is now ready to acknowledge the history and meaning of "nigger" as it has been directed against African Americans in general, and to acknowledge the "interest" of all American workers-- and not just African American workers-- in not being called "niggers" in the workplace.[16] As mentioned in

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reasonable steps to defend against physical harm, employees who do so are not engaging in 'unreasonably hostile or aggressive' activity. Reasonable defense against physical violence may be protected oppositional activity." Id.

[16] Thus, in reaching this conclusion, this Court should hold that "nigger" is so thoroughly engrained in the institution of chattel slavery that usage of "nigger" in an employment setting may, under certain circumstances, offend both the Thirteenth Amendment and Section 1981. The Thirteenth Amendment was enacted not simply to protect African Americans but to abrogate the condition of chattel slavery and involuntary servitude-- whether the slaves or servants be white, red, yellow, black or brown. Indeed, this Court has held in *Hodges v. U. S.*, 203 U.S. 1, 16 17 (1906) that: "The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of

the comment section on Restatement (Second), Torts § 1, "emotional tranquility, for which the great mass of mankind feels a keen desire, is as much an 'interest,' as 'interest' is defined in ... possession of land or the security of one's person.... If society recognizes a desire as so far legitimate as to make one who interferes with its realization civilly liable, the interest is given legal protection.... The entire history of the development of tort law shows a continuous tendency to recognize as worthy of legal protection interests which previously were not protected at all." Since the word "nigger" is a racial slur, its usage in the workplace is regulated by § 1981, which outlaws racial discrimination. "Nigger" in the workplace can constitute the *tort of defamation*[17], since it can negatively impact the reputation[18] of an African

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enforced compulsory service of one to another. While the moving cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the nation. It is the denunciation of a condition, and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the nation, it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon, are as much within its compass as slavery or involuntary servitude of the African."

[17] Restatement (Second), Torts § 559, defines defamation as "[a] communication [which]...tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." The Comment to § 559 states that "[c]ommunications are often defamatory because they tend to expose another to hatred, ridicule or contempt. A defamatory communication may tend to disparage another by reflecting unfavorably upon his personal morality or integrity...."

[18] Defamation is an invasion in an "interest in reputation." See,

American employee in the workforce; particularly if "nigger" is directed at a black employee or used in connection with describing his or her knowledge, skills, occupational abilities, and job performance. *When the usage of "nigger" in the workplace is defamatory, it does deprive the victim (usually an African American employee) of the right to make and enforce contracts as is enjoyed by white citizens.* Since § 1981 imposes upon employers a duty to protect their workers from race-based torts, this Court should announce, in no uncertain terms, that directly referring to any American worker[19] as a "nigger" constitutes sufficiently severe and pervasive conduct

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e.g., Restatement (Second) Torts, Chapter 24, Invasions of Interests In Reputation, §§ 558 581A. In the antebellum South, the denial of a "reputation or character" to African Americans has been documented as a "badge or incident" of chattel slavery in William Goodell's *The American Slave Code*, (New York, NY: American and Foreign Anti Slavery Society, 1853), p. 291, (Reprinted by the University of Michigan University Library); Goodell described the slaves' "civil condition" as follows: "Not being accounted a person, but a thing, he can have no personal rights to be protected-- no rights of reputation or character-- no right to education-- no rights of conscience-- no rights of personal security -- no social rights-- no political capabilities or rights-- not even the right of petition, as the Federal Congress (very consistently with its recognition of legal human chattel hood) have affirmed. It would be an anomaly to receive the testimony of such a one in a Court of law!" Perhaps Goodell's summation of the slave's "civil condition" provides a most accurate definition of the word "nigger."

[19] This holding would not only redress a historic wrong done to the black race, but would also cover all American workers, even though it especially applies to African American employees. In essence, "white or Caucasian nigger" "red or Native American nigger" "yellow or Asian nigger" and "brown or Hispanic nigger" should be just as unlawful as "black or African nigger."

that arises to the level of a racially hostile work environment and is indicative of disparate treatment with respect to other terms, conditions and privileges of employment (e.g., failing to train an employee because of his race).[20]

Whether "nigger" is defamatory turns on the "totality of circumstances," i.e., whether the aggrieved employee was actually referred to as "nigger."

Pursuant § 1981 (and Title VII of the Civil Rights Act of 1964), an employee's emotional tranquility was first established as a "legal interest" (i.e., a "term, condition, and privilege of employment") in the case of *Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971). In that case, Judge Goldberg held: "Therefore, it is my belief that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase 'terms, conditions, or privileges of employment' in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.... One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices."

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[20] To avoid liability, employers should still be permitted to rely upon the Faragher/ Ellerth defenses. *Burlington Indus., Inc. v. Ellerth*, 524 US 742 (1998), and *Faragher v. City of Boca Raton*, 524 US 775 (1998).

The United State Supreme Court first embraced the Fifth Circuit's holding in *Rogers v. EEOC*, supra, in the landmark decision of *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986). Later, in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the Supreme Court clarified the evidentiary standard needed to show the severity of the harassment which impacts an employee's psychological well-being. In *Harris*, Justice O'Connor stated in the majority opinion that:

> Title VII [and § 1981] comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's [and § 1981's] broad rule of workplace equality....
>
> We therefore believe the District Court erred in relying on whether the conduct 'seriously affect[ed] plaintiff's psychological well-being' or led her to 'suffe[r] injury.' Such an inquiry may needlessly focus the fact finder's attention on concrete psychological harm, an element Title VII [and § 1981] does not require. Certainly Title VII [and § 1981] bars conduct

> that would seriously affect a reasonable person's psychological well-being, but that statute is not limited to such conduct....
>
> This is not... a mathematically precise test.... But we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances.'"[21]

Whether an employee has the "equal enjoyment" of his employment contract turns on whether "the environment would reasonably be perceived, as hostile or abusive."[22] The Eleventh Circuit, as all other circuits, has adopted an evaluation approach that looks at the "totality of circumstances." In *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982), the court held: "[t]he former fifth circuit has held that the state of psychological well being is a term, condition, or privilege of employment within the meaning of Title VII.... For sexual [or racial] harassment to state a claim under Title VII, it must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Whether sexual [or racial] harassment at the workplace is sufficiently severe and persistent is a question to be determined with regard to totality of circumstances."

The "totality of circumstances" requires, at a minimum, that courts look at the context in which racial slurs are uttered. The Eleventh Circuit determined in *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 (11th Cir. 1982) that, while utilizing a

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[21] 510 U.S. 17, 22 (1993).

[22] Id. at 371.

"totality of circumstances" approach, the utterance of the words "niggered-rigged," "black-ass," and "other racially abusive language," which made an African American employee "feel unwanted and uncomfortable in his surroundings," was sufficient evidence to show a racially hostile work environment. More recently, while relying on its own holding in *Walker v. Ford Motor Co*, supra, the Eleventh Circuit held in *Reeves v. C.H. Robinson Worldwide, Inc.*, 525 F.3d 1139, 1147 (11th Cir. 2008), that harassing conduct "need not have tangibly affected the plaintiff's job performance in order to be actionable." Thus given the legal framework upon which the Petitioner's racially-hostile work environment and failure to train claims ought to have been judged, the following language in the District Court's decision is fraught with legal inconsistencies: **"Although the racial epithets were offensive, such conduct, which is denied on the part of Defendant, did not rise to the level of severity needed to create a hostile work environment. Plaintiff suffered no difficulties in performing his job duties, and, in fact, was promoted to a lineman position in the expected amount of time."**[23]

First, the District Court states, "[a]lthough the racial epithets were offensive," but omitted looking at the totality of the circumstances to ascertain whether the Petitioner was reasonably divested of the "equal enjoyment" of his employment contract due to the impact of the racial epithets on his psychological well-being.[24] In other words, the District Court failed to ask

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[23] Summary Judgment Order, Appendix, p. 12a.

[24] Although the Petitioner was eventually promoted to a regular

whether the usage of "nigger" was tortuous or defamatory towards the Petitioner, or merely used in an offensive, stray remark. The District Court evaded its obligation to apply a "totality of circumstances" analysis as it was required to do pursuant to § 1981. *Henson v. City of Dundee*, supra.

Second, the District Court states that "Plaintiff suffered no difficulties in performing his job duties"[25]; however, harassing conduct "need not have tangibly affected the plaintiff's job performance in order to be actionable." *Reeves v. C.H. Robinson Worldwide, Inc.*, supra.

Third, the District Court states that "in fact, [Petitioner] was promoted to a lineman position in the expected amount of time"; however, tangible economic harm is not required[26] to show a racially-hostile work

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lineman, he nevertheless alleges that he has sustained non-economic damages for emotional pain and suffering stemming from racial harassment and a denial of training during his apprenticeship training. In 2002, the Petitioner's treating physician was Sharad R. Lakdawala, M.D., Psychiatric Associates, 2908 W. Waters Avenue, Suite 101, Tampa, Florida 33614.

[25] Id.

[26] The racially-offensive slur "nigger" created inferior terms, conditions and privileges of employment, regardless of all other employment terms being equal, such his fair pay and ultimate promotion to journeyman lineman. When Brown heard that lineman Brett Savage had referred to him as a "nigger," that he became upset and no longer felt comfortable working around him. The word "nigger" was directed at Brown under acrimonious circumstances, and thus disturbed his mental constancy while at work. Furthermore, the word "nigger" made Brown to perceive that other workplace training practices, such as digging ditches and bucket training, were put in place to discriminate against him, and, thus, "nigger" did detract from Brown's ability to

environment. *Meritor Sav. Bank, FSB v. Vinson*, supra; *Harris v. Forklift Systems, Inc.*, supra.

The record clearly shows that "nigger" was used in its "historic context" and to describe the Petitioner in a defamatory manner.

In this case, the "totality of circumstances" regarding the usage of "nigger" is clearly and concisely reflected in the record evidence. The usage of "nigger" in this case permit a reasonable jury to conclude that Petitioner Brown became "uncomfortable with his surroundings"[27] and that a senior lineman's repeated description of him as a "nigger" was defamatory, and thus arose to the level of a racially-hostile work environment.

The "totality of circumstances" also permit a reasonable jury to conclude that the Respondent refused to provide the same quality of apprenticeship training to Petitioner Brown-- i.e., that the Respondent failed to train the Petitioner because of his race .

Petitioner Brown, in support of his hostile work environment and failure-to train claims, submitted in the record, inter alia, sworn witness affidavits[28] whereby a reasonable jury could conclude that the "totality of circumstances" show that the usage of "nigger" was sufficiently severe enough to detract from

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perceive whether or not his apprenticeship training was being administered fairly and on a non-discriminatory basis.

[27] *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 (11th Cir. 1982).

[28] Witness Affidavits, pp.28a—47a.

Petitioner Brown's "equal enjoyment" of his apprenticeship training, to wit, that the repeated usage of "nigger" divested Brown of his legal right to "make and enforce contracts ...as is enjoyed by white citizens."

(a). William Brown Affidavit

In his sworn affidavit, Petitioner Brown established unequivocally that he put the Respondent on notice of racially discriminatory treatment since 2002. Brown stated that: "I experienced discrimination and harassment, as stated in my Second Amended Complaint, the entire time that I was employed at the Tarpon Springs location [from March 11, 2002 until June 2006]. While I did not file formal written complaints, I repeatedly complained to my foreman Jeff Harris, who took no action, and advised me repeatedly to try to work things out with the Lineman on the crew. Jeff Harris knew all along that I was being discriminated against in the terms and conditions of my employment and harassed because of my race, during the entire period of my employment at the Tarpon Springs locations."[29]

The record below reflects that from 2002 until November 18, 2006, that the Respondent took no action to address Brown's complaints.

In June of 2006, Brown transferred to another location to get away from his harasser Bret Savage. Nevertheless, on November 18, 2006, Mr. Savage approached Brown, who was still a lineman apprentice, and accused Brown of violating a safety standard. Mr. Savage reported this alleged safety

[29] William Brown Affidavit, p. 34a.

violation to management. On November 18, 2006, Brown called the company's Ethic's Hotline to report Savage's harassment. Only then, on November 18, 2006, did the Respondent take action to address Brown's harassment complaints. However, by that late date, Brown had already been subjected to more than four years of unabated discriminatory treatment at the hands of Mr. Savage.

(b) David Tim Affidavit

Mr. David Tim, a black man, stated in his affidavit that: "I remember Bret Savage was an apprentice and when he eventually became a Lineman. Mr. Savage often spoke to me in a very dismissive, demeaning manner, even though I was senior to him in rank. I also felt that Ms. [sic] Savage was harassing me because of my race or color, whenever he spoke to me in a very demeaning manner. I never observed Mr. Savage speak to white employees or co-workers in the same manner in which he spoke to me. After I got off of Bret Savage's crew, he continued to speak to me in the same demeaning, sarcastic manner. I also observed Mr. Savage speak to other African Americans in the same manner, although I cannot remember specific dates or times."[30]

(c) Robert Langille Affidavit

Mr. Langille stated in his affidavit that: "During this period, the Lineman rode all of the Lineman Apprentices pretty hard; however, I did observe Bret Savage single out and ride William Brown harder than the other Linemen Apprentices. I heard Bret Savage

[30] David Tim Affidavit, p. 37a.

call and (or) refer to Mr. Brown as 'nigger,' on more than one occasion...."[31]

(d) Martin Rivera Affidavit

Mr. Rivera stated in his affidavit that: "I observed Bret Savage (white male) harass William Brown.... In February 2007, I overheard Bret Savage refer to William Brown [as] a 'fucking nigger.'"[32]

4. Brown filed his Complaint pursuant to 42 U.S.C. § 1981 in the United States District Court, Middle District of Florida, Tampa Division, on September 10, 2007. The United States District Court had federal question jurisdiction over Brown's claims pursuant to 28 U.S.C. § 1331. On January 29, 2009, the District Court entered an order granting summary judgment to Progress Energy. On January 30, 2009, the District Court entered final judgment in favor of Progress Energy.

5. On February 27, 2009, Brown filed a timely notice of appeal to the Eleventh Circuit Court of Appeals. The Eleventh Circuit had jurisdiction of the said appeal pursuant to 28 U.S.C. § 1291. The U.S. Equal Employment Opportunity Commission joined as a party and presented an amicus curiae brief in support of the Petitioner William Brown. The parties presented oral arguments before the Eleventh Circuit on December 1, 2009. On February 4, 2010, the Eleventh Circuit issued an order which affirmed the District Court's summary judgment order.

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[31] Robert Langille Affidavit, p. 41a.

[32] Martin Rivera Affidavit, pp. 45a—46a.

REASONS FOR ALLOWANCE OF THE WRIT

The United States Supreme has an obligation to safeguard meaningful access to the federal courts and to guard against Rule 56 abuses in summary judgment proceedings. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986), this Court held that in Rule 56 summary judgment proceedings, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Further, this Court instructed: "the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." In this case, the utterance of the racial slur "nigger" is predominant; for it presents a question that is rooted in the institution of American slavery, the XIII Amendment to the U.S. Constitution, and the Civil Rights Act of 1866 (42 U.S.C. § 1981).

In this case, Petitioner Brown does not seek a Supreme Court ruling which states that an employer must be held liable anytime one of its employees utters the word "nigger."[33] *Instead, Brown seeks a Supreme*

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[33] The Petitioner asks this Court to look to the common law of defamation and history as guides. Justice Holmes once wrote that "the life of the law has not been logic: it has been experience... it is [not] only the axioms and corollaries of a book of mathematics... we must consult history [because] the substance of the law...depends very much [on] the study of history." O.W. Holmes, Jr., "The Places of History in Understanding Law," *The Life of the Law* 3 (J. Honnold ed., 1964).

Court ruling which fairly establishes a clear and concise constitutional boundary for determining when the usage of "nigger" is legally actionable as an affront to § 1981 (and Title VII). Petitioner would urge the court to adopt the following boundary:

Illustration 1.

> **A**, the employer, employs **B**, a white employee, **C** a white employee, and **D**, a black employee. **B**, who is frustrated and angry with **D**, calls **D** a "nigger." **C** is also present when **B** utters "nigger." **D** complains to **A**, who fails to admonish or discipline **B**. **A**, the employer, is liable under § 1981 (and Title VII) for "hostile work environment" (whether or not **B** directly called **D** a "nigger" or only referred to **D** as a "nigger" when speaking to other co-workers). The reason is that **B** has clearly used "nigger" in a manner that is defamatory to **D**.

Illustration 2.

> Same as Illustration 1, except **D**, the black employee, hears **B** tell **C**, a fellow white employee, a joke in which the word "nigger" is used. **D** finds the joke distasteful and reports it to **A**, the employer. **A** fails to take action against **B** or **C**. **A** should not be liable under § 1981 (and Title VII), since "nigger" was not directed at **D**. In that case, "nigger" could be described as a "stray" remark. On the other hand, if **B** and **C** continuously and repeatedly tells jokes in which "nigger" is used, then the repeated and continuous usage of "nigger" arises to the level of severity and pervasiveness that

does violate § 1981 (and Title VII).

Illustration 3.

A, the employer, calls **D**, an employee, a "nigger." A should be automatically liable under § 1981 (and Title VII) for "hostile work environment."

Thus, Petitioner seeks a ruling from this honorable Court which states in no uncertain terms that calling an African American employee a "nigger," even on a single occasion, is *defamation* and is severe and pervasive enough to create a hostile work environment and thus violates § 1981 (and Title VII).

Such a Supreme Court ruling would be reasonable. It would costs employers little or nothing financially to implement and enforce. And it would provide adequate protection to the "psychological well-being" component to African American workers' terms, conditions and privileges of employment.

Finally, such a ruling would still permit an employer to avail itself of the Faragher/Ellerth defenses[34]; meaning that the employee would need to follow proper reporting procedures and afford the employer a reasonable opportunity to abate the usage of "nigger" in the workplace.

A writ should be allowed to enable this Court to establish a clear constitutional or

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[34] *Burlington Indus., Inc. v. Ellerth*, 524 US 742 (1998), and *Faragher v. City of Boca Raton*, 524 US 775 (1998).

statutory boundary on usage of "nigger" in the workplace.

The Supreme Court should protect African Americans' "equal enjoyment" interests in psychological well-being and emotional tranquility through carefully regulating the usage of "nigger" in the workplace.

As it now stands, American jurisprudence has approached "nigger" by -- to paraphrase Abraham Lincoln-- "groping for some middle ground between the right and the wrong, vain as the search for a man who should be neither a living man nor a dead man."[35]

As it now stands, the Circuits are split on, or have altogether evaded, the critical question of the intangible psychological impact of "nigger" on the black American worker. The Circuits are split on this question partly because "nigger" can be used in a multitude of contexts.[36] For example, as presented in Illustration 2 above, "nigger" can be used in joke or a general conversation which makes no reference to any particular employee. While usage of "nigger" in this context would lack decorum, the Circuits have uniformly held that "nigger" and other similar racial slurs, when uttered as jokes or in conversations that do not target specific individuals, are mere "stray" remarks which is not sufficiently severe to create a hostile working environment.[37] (See, e.g., Illustration 2

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[35] Herbert Mitgang, ed., *Selected Writing of Abraham Lincoln* (New York, NY: Bantam Books, 1992), p. 130.

[36] See, e.g., Randall Kennedy, *Nigger: The Strange Career of a Troublesome Word* (New York: Vintage Books, 2002).

[37] See, e.g., *Nettles v. LSG Sky Chefs*, 2006 WL 3345290 (11th Cir. Nov. 20, 2006), at *2 ("Nettles claims his direct supervisor,

above). However, the Circuits have also held that when such "stray" remarks are repeated and continuing, even after complaints are lodged, and where perpetrators of such racial slurs go uncorrected

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Dennis Mancini, harassed him by undermining him, disagreeing with him, denying him training, and unfavorably comparing minority staff members with non-minority staff members. After a review of the record, we conclude there is no evidence any of these actions were motivated by race. The only race-related statements Nettles alleges were not directed at Nettles and were made outside of Nettle's presence"); *Harrington v. Disney Regional Entertainment*, 2007 WL 3036873, at *11 ("African-American employee was not subjected to racially hostile work environment, in violation of Section 1981, due to fact that she overheard white co-worker call another worker 'a lazy nigger,' heard co-workers use term 'ghetto,' and was forced to work outside despite her doctor's note indicating that she could not work in sun, where racial epithets were isolated, and there was no evidence that outdoor assignment outside had anything to do with racial hostility"); and *Jordan v. Alternative Resources Corp.*, 447 F.3d 324 (4th Cir. 324) ("While Farjah's comment on October 23, 2002 (or October 24) was unacceptably crude and racist, it was an isolated response directed at the snipers through the television set when Farjah heard the report that they had been arrested. Because the remark was rhetorical insofar as its object was beyond the workplace, it was not directed at any fellow employee. Moreover, it was a singular and isolated exclamation, having not been repeated to Jordan or in his presence before or after October 23, 2002. Jordan does not and cannot allege in his complaint that Farjah's comment altered the terms and conditions of his employment. Based on all that Jordan knew, Jordan concluded that the remark reflected unacceptable racism and should not have been made. And while we agree with Jordan's sentiment, we conclude that such an allegation is a far cry from alleging an environment of crude and racist conditions so severe or pervasive that they altered the conditions of Jordan's employment with IBM or ARC. The complaint does not describe a workplace permeated by racism, by threats of violence, by improper interference with work, or by conduct resulting in psychological harm.")

or undisciplined, then the word "nigger" and similar racial slurs can indeed become "severe" and create a hostile working environment.[38] (See, e.g., Illustration 2 above).

Thus far, American courts as a whole have failed to state unequivocally that calling a black American a "nigger" is illegal under § 1981 (and Title VII). Thus far, no American court has ever answered the implicit but fundamental question, *"Why do American employers and employees need license to ever use 'nigger'?"* No employer in the United States can advance a valid business reason or justification for ever using the word "nigger." And yet the lame position of the American courts thus far has been to grope for some middle ground, which permits black American workers-- and conceivably any American worker-- to be called "niggers" without recourse. Illustration #1, above, presents the sort of conditions which make African American employees shudder. This Court should abate this antebellum relic.

A writ should be allowed to enable this Court to prevent de facto racial segregation in the workplace and a breakdown in industrial relations

Usage of "nigger" in the workplace, even on a single occasion, in a defamatory manner (i.e, in its historic context), tends to socially and spiritually separate black and white or non-black workers-- even if there is no physical segregation between them.

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[38] See, e.g., *Jordan v. Alternative Resources Corp.*, 447 F.3d 324 (4th Cir. 324).

In *Brown v. the Board of Education of Topeka*, 347 U.S. 483, 493 (1954), this Court grappled with a question that is analogous to the one currently before it: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" This Court held,

> We believe that it does.... 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.' Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected. Id. at 493-495.

This is what actually transpired in Petitioner Brown's case: "nigger" created a racially divisive working environment in which Brown felt isolated.

The reasoning of the District Court, which the Eleventh Circuit affirmed, is that "[a]lthough the racial epithets were offensive, such conduct, which is

denied on the part of Defendant, did not rise to the level of severity needed to create a hostile work environment. Plaintiff suffered no difficulties in performing his job duties, and, in fact, was promoted to a lineman position in the expected amount of time."[39] Both the District Court and the Eleventh Circuit, however, have evaded the "intangible" psychological impact of the word "nigger" on Petitioner Brown and on African American workers in general. Dr. Martin Luther King, for example, vividly displayed in his *Letter From the Birmingham City Jail*, the word "nigger" as an integral part of the system of racial segregation: "I guess it is easy for those who have never felt the stinging darts of segregation to say, 'Wait'... when your first name becomes 'nigger' and your middle name becomes 'boy' (however old you are)....then you will understand why we find it difficult to wait."[40] The system of racial segregation included the denial of public accommodations, skilled or white-collar jobs and quality education, among other things, to African Americans, whom many non-blacks believed to be "niggers." "As Senator Humphrey explained to the Senate: 'What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford to pay the bill? What good does it do him to be accepted in a hotel that is too expensive for his modest income? How can a Negro child be motivated to take full advantage of integrated educational facilities if he has no hope of getting a job where he can use that education?'" *Steelworkers v. Weber*, 443 U.S. 193, 203

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[39] Summary Judgment Order, p. 11a--12a.

[40] *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* (New York: Harper Collins, 1986), pp. 292-293.

(1979). Hence, the link between education and employment is axiomatic. If an African American can still be called a "nigger" in the modern American workplace, without legal consequences, then his ability work to with non-black co-workers and to reach his fullest potential in a multiracial workplace will be significantly compromised.

Accordingly, a writ should be granted so that this Court can answer the following question: *Does the word 'nigger' when directed at an African American, who is in private employment, deprive him or her of the right to make and enforce contracts as is enjoyed by white citizens?*

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE APPLICATION OF § 1981 TO USAGE OF "NIGGER" IN AN EMPLOYMENT SETTING.

A. The Eleventh Circuit's holding conflicts with the U.S. Supreme Court.

The District Court's finding that the use of "nigger" was not sufficiently severe to create disparate treatment focused only on the lack of a tangible economic impact of "nigger" on Petitioner Brown's work performance and his ultimate promotion to lineman. The District Court evaded its legal obligation to also look at the "intangible" non-economic impact of "nigger" on Brown's psychological well-being, which this Court held to be a term, condition and privilege of employment. *Meritor Sav. Bank, FSB v. Vinson*, supra and *Harris v. Forklift Systems, Inc.*, supra. Clearly, the usage of "nigger" in this case was

defamatory towards Brown.

Hence, the District Court failed to apply a "totality of circumstances" analysis to Petitioner Brown's case. In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993), this Court stated that "Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.... So long as the environment would reasonably be perceived, as hostile or abusive... there is no need for it also be psychologically injurious.... This is not... a mathematically precise test.... But we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances.'"

To look at all the circumstances, particularly as reflected in Petitioner's witness affidavits[41], the District Court must ask whether "nigger" was defamatory (i.e., used in its historic context); and, if so, whether "nigger" had an intangible psychological impact on Petitioner Brown. The District Court failed to do this.

B. The Eleventh Circuit's holding conflicts with the Seventh Circuit.

In *Rodgers v. Western-Southern Life Insurance Co.*, 12 F.3d 668 (7th Cir. 1993), a white supervisor used the word 'nigger' on two occasions in the plaintiff's presence, and on another occasion he told

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[41] See Appendixes pp. 28a--47a.

the plaintiff. 'You must think you're back in Arkansas chasing jackrabbits.' 12 F.3d at 671. The same white supervisor also told other black employees that '[y]ou black guys are too fucking dumb to be insurance agents." 12 F.3d at 673. The trial court held that these racial slurs significantly impaired the plaintiff's work performance, concluding that they 'undeniably had a profound psychological effect upon [plaintiff] Rodgers" and "made Rodgers feel as though [supervisor] Mann questioned Roger's professional competence because of his race." 12 F.3d at 673. The Seventh Circuit affirmed, holding:

> We are mindful of the inherently stressful nature of Rodger's job, and we not in passing that Rodgers would not have an action under Title VII if Mann had not mixed racist comments into his daily routine of race-neutral verbal abuse. Nevertheless, after careful review of the district court's factual and credibility findings, we are persuaded that Mann's racist comments and taunts, though perhaps not the sole factor, contributed significantly to the stress condition that compelled Rodgers to resign from Western-Southern. We do not find Rodgers' claim diminished by the lapse of time between the utterance of the racially offensive remarks and his resignation." Id.

The *Rodgers* court also adopted the reasoning of *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486, 1524 (M.D. Fla. 1991), stating, inter alia, "[A] holistic perspective is necessary, keeping in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and

that the work environment created thereby may exceed the sum of the individual episodes." Id.

C. The Eleventh Circuit's holding conflicts with the Fifth Circuit.

The Fifth Circuit has treated the racial epithet "nigger" as direct evidence of racist intentions on the part of supervisors. See, e.g., *Brown v. East Mississippi Electric Power Association*, 989 F.2d 858 (5th Cir. 1993). Examples of the racial slurs include: "I had to dust my little nigger again today." "I haven't seen my little nigger friend this morning," and "What do you want, nigger?" The Fifth Circuit thus held in *Brown v. East Mississippi Electric Power Association*:

> [Supervisor] Pippen's routine use of racial slurs constitutes direct evidence that racial animus was a motivating factor in the contested disciplinary decisions. Pippen's use of the racial epithet was not, as EMPA suggests, an innocent habit. Unlike certain age-related comments which we have found too vague to constitute evidence of discrimination, the term 'nigger' is universally recognized opprobrium, stigmatizing African-Americans because of their race. That Pippen usually was circumspect in using the term in the presence of African Americans underscores that he knew it was insulting. Nonetheless, he persisted in demeaning African-Americans by using it among whites. This is racism. Pippen's racism infected the disciplinary decisions of which Brown complains. Id. At 861.

D. The Eleventh Circuit's holding conflicts with the decisions of the U.S. Equal Employment Opportunity Commission.

Finally, U.S. Equal Employment Opportunity Commission held on several occasions that the word "nigger" may be sufficient to alter the terms and conditions of a black person's employment and to create hostile work environment or other form of disparate treatment. EEOC Dec. No. 71-99, 3 FEP 269(Dec. 24, 1970)[42]; EEOC Dec. No. 71-2598, 4 FEP 21 (June 22, 1971); EEOC Dec. No. 72-0779, 4 FEP 317 (Dec. 30, 1971)[43]; EEOC Dec. No. 72-0957, 4 FEP 837

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[42] "Reasonable cause exists to believe that employer violates Title VII by maintaining working environment in which racial insults, in form of supervisors' habitual reference to Negro employees as 'niggers,' is countenanced... "With respect to the supervisor's language, the Commission states: 'An employer is responsible for the behavior of it agents within the course of their employment. It is also obliged under this Act to maintain a working atmosphere free of racial intimidation or insult. Failure to take steps reasonably calculated to maintain such an atmosphere violates the Act ... That the racial insults were not directed to Charging Party, but to his fellow employees, renders the act no less a violation. Indeed, Charging Party was so offended by the epithet and the attitude underlying its use that he determined to resign his employment. That Charging Party was "aggrieved" in fact and as a matter of law is well settled.... Had Charging Party been retained until his 'resignation' based upon his unwillingness to work in an environment of racial insults, we would find his resignation to be a constructive discharge."

[43] "Reasonable cause exists to believe that employer violated Title VII by failing to take reasonable steps to remedy effect of incident in which Caucasian assistant supervisor called employee 'Nigger', since Act requires employer to maintain working

(Feb. 2, 1972); EEOC Dec. No. 72-1561, 4 FEP 852 (May 12, 1972). *Rodgers v. Western-Southern Life Insurance Co.*, *Brown v. East Mississippi Electric Power Association*, and the above-cited EEOC Decisions not only conflict with the Eleventh Circuit, but these opinions are factually analogous to Brown's case.

Thus, certiorari is warranted to resolve a conflict between the Eleventh Circuit and the U.S. Supreme Court on the application of a "totality of circumstance" analysis to the usage of "nigger" in the

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environment which is free of racial intimidation.... The charging party also alleges that the Caucasian referred to him as a 'Nigger' while he was out sick and that the employer took no action to remedy the situation. The employer admits that the charging party complained to it concerning this alleged misconduct. Evidence indicates that the Caucasian assistant supervisor had referred to the charging party as a 'Nigger.' "The Commission states: 'The Supervisor of the department admits that he dropped his 'investigation' of the matter when the Caucasian denied making the remark. The Personnel Manager stated that he talked to Charging Party about the incident but does not claim to have made any investigation of the matter or talked to any possible witnesses. Thus we cannot credit the subsequent claim made by Respondent, through its attorney, that Respondent did seek out such witnesses or otherwise investigate, in any meaningful sense, the truth of Charging Party's complaint. Title VII requires an employer to maintain a working environment free of racial intimidation. That requirement includes positive action where positive action is necessary to redress or eliminate employee intimidation. In light of the foregoing evidence we infer that the racial epithet was uttered by a supervisory employee, that Respondent's management had knowledge of the fact, failed to take reasonable steps to remedy its effects and thus discriminated against Charging Party because of his race within the meaning of the Act."

workplace; and to resolve a split between the Eleventh Circuit and the other Circuits as to whether the usage of "nigger," when directed at an African American employee under acrimonious circumstances, is sufficiently severe to create a hostile working environment and racially-discriminatory apprenticeship training.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM C. BROWN

Plaintiff,

v. CASE NO. 8:07-CV-1599-T-26TGW

PROGRESS ENERGY

Defendant.
_____/

O R D E R

Before the Court are Defendant's Motion for Summary Judgment, affidavit, depositions and exhibits (Dkts. 25-28), Plaintiff's Response in Opposition and attachments (Dkts. 41-43), Plaintiff's Motion for Summary Judgment and affidavit (Dkts. 29 & 30), and Defendant's Memorandum in Opposition, Statement of Disputed Facts, and affidavits. (Dkts. 36-40.) After careful consideration of the submissions of the parties and the entire file, the Court concludes that Plaintiff's motion should be denied and Defendant's motion should be granted.

Background

Plaintiff, William C. Brown, began working for Defendant, Progress Energy, on March 11, 2002, as a Lineman Apprentice at the Tarpon Springs Operation Center. He transferred in June 2006 to the Seven Springs Line Department, and by October 2006, Plaintiff had completed his training and was promoted to the position of Lineman. Plaintiff filed a claim with the EEOC after an incident on November 18, 2006, in which he claims that he was racially harassed by his former crew of Tarpon Springs. In 2007, Plaintiff transferred again, this time to a Distribution Travel Crew based out of Tarpon Springs, where Plaintiff remains employed by Defendant.

Pertinent Facts

Both parties seek summary judgment in this action brought pursuant to 42 U.S.C. § 1981 which seeks relief for subjection to a racially hostile work environment and

denial of training. The facts must be taken in the light most favorable to the non-moving party on each of the motions. The following events transpired during the approximately four-year period Plaintiff spent as a lineman apprentice in training for the position of lineman, which he attained in October 2006.

Plaintiff was the sole African-American lineman apprentice out of five apprentices and five linemen at the Tarpon Springs center. Plaintiff claims that he was singled out and denied the necessary training to become a lineman. Specifically, Plaintiff claims that Bret Savage,[1] the senior lineman, and Paul Montenare, a lineman, denied him the opportunity to train in the hydraulic bucket as many times as his fellow non-black apprentices.[2] Savage

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[1] Plaintiff claims that Bret Savage was in charge of training the apprentice linemen.

[2] Plaintiff claims that his fellow apprentice linemen told him that he

and Montenare required him to dig ditches and holes, and did not require his fellow non-black apprentices to dig, but required them to watch Plaintiff work.[3] Plaintiff also claims that he was denied the use of the newer white bucket trucks to permit less senior white apprentices to use the newer trucks.[4] Finally, Plaintiff claims that Robert

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received less bucket time because of his race—that he was black. The fellow apprentices were Robert Languille, James Jankowski, Wayne Barrett, Jim Foseck and Dan Hagen.

[3] Plaintiff claims that Jankowski, Langille and Barrett, all fellow apprentice linemen, told Plaintiff that Savage and Montenare were being hard on Plaintiff because he was black.

[4] Plaintiff complained to the Union about this incident; however, the Union did not process his grievance. Plaintiff claims that Marshall Harper, another apprentice lineman, told him to stop complaining about not receiving a white truck because he was drawing negative attention to the crew.

Langille, a fellow apprentice lineman, and Martin Rivera, another fellow apprentice lineman, overheard Savage call Plaintiff a "nigger" on several occasions, and James Jankowski, a co-worker, once heard Savage exclaim that he planned to "get that nigger [Plaintiff] fired." John Hadfield, a lineman, joked with Plaintiff about eating chicken for lunch, referring to African-Americans liking chicken.[5] Plaintiff claims that after he complained to Jeff Harris, Plaintiff's supervisor, about the racial slurs, the linemen stopped training him. Harris told Plaintiff to try to get along with Savage. Plaintiff claims he complained to Harris numerous times about his treatment by Savage and Montenare, but Harris always told him to work it out. Plaintiff received satisfactory performance

[5] Plaintiff also adds that Savage and Hatfield referred to Mexicans as "sweatbacks."

reviews throughout his employment with Defendant. An incident occurred on November 18, 2006, after he had moved to Seven Springs, but before he became a lineman. He learned that his old Tarpon Springs crew headed by Savage would be coming to Seven Springs to assist with a big job. Plaintiff told his fellow crew workers that the Tarpon Springs crew would give him a hard time because he was black. When Savage arrived, Plaintiff claims he started quizzing him about work. Later that day, Savage accused Plaintiff of a safety violation, not wearing gloves while up in a bucket next to a power line pole. After Savage reported Plaintiff and an investigation was conducted, Plaintiff was given a written reprimand and lost one day's pay. On that same day, Plaintiff called the ethics line to report racial harassment by Savage, but the investigation found no harassment. Thereafter, Plaintiff filed a claim with the EEOC and this action ensued.

Plaintiff's Motion

Failure to Train

To establish that Defendant failed to train Plaintiff, Plaintiff must show that he is a member of a protected class, that he was entitled to or qualified for the job, that he suffered an adverse employment action, and that he was treated less favorably than similarly situated employees who are not members of his protected class. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1331 (11th Cir. 1998); Williams v. Health Maint. Org. of Fla., 689 F.Supp. 1082, 1089 (M.D. Fla. 1988). Despite Plaintiff's claim that he was denied training, there is no assertion or evidence that he did not receive a timely promotion to the position of lineman and, therefore, Plaintiff cannot show that he suffered any adverse employment action. There is no indication that the failure to work as often in the bucket as other apprentice linemen resulted in any negative action. On

the contrary, he was promoted to lineman after four years and seven months when it takes some apprentice linemen as long as eight or nine years to qualify. Plaintiff qualified for the position of lineman before all but one of the non-black apprentice linemen. Plaintiff's own deposition testimony reveals that the apprentice lineman who was promoted before him had started to work for Defendant prior to Plaintiff. With respect to his claim that he was not treated as favorably as other non-black employees, Plaintiff admitted that three of his fellow apprentice linemen had less experience than he and therefore were not similarly situated to Plaintiff in all respects. Even assuming Plaintiff could establish a prima facie case of disparate treatment, Defendant has articulated a legitimate, non-discriminatory reason for limiting his time in the bucket. Plaintiff's seniority among the apprentice linemen made it necessary to permit other apprentices time in the hydraulic bucket. According to Savage and

Montenare, they never refused training to Plaintiff on the basis of race. They gave him satisfactory performance reviews and he was promoted to lineman. If Plaintiff received less training at Tarpon Springs, the reason was due to his seniority and experience compared to the other apprentice linemen.

Hostile Work Environment

Based on the same facts, Plaintiff seeks relief for a hostile work environment. To establish a racially hostile work environment under section 1981, the plaintiff must show that he belongs to a protected class, that he was subjected to unwelcome harassment, that the harassment was based on a protected characteristic of the employee, i.e., race, that the harassment was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," and that his employer is liable. Harrington v. Disney Regional Entm't, Inc., 2007 WL 3036873, at *11 (11th Cir. Oct. 19, 2007);

Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002). The "severe and pervasive" requirement possesses both objective and subjective components. Harrington, at *11 (citing Faragher v. City of Boca Raton, 524 U.S. 775, 787, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)). The employee must subjectively perceive the severity of the harassment and the perception must be objectively reasonable. Id. Four factors may be considered to analyze the severity: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is humiliating or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance. McCann v. Tillman, 526 F.3d 1370, 1379 (11th Cir. 2008); Harrington, at *11 (citing Gupta v. Florida Bd. of Regents, 212 F.3d 571, 584 (11th Cir. 2000)).

Plaintiff admitted that apprentice linemen were occasionally denied hydraulic bucket training when they requested it, and certainly any denial of training did not

prevent him from being promoted to a lineman. With respect to digging trenches, Plaintiff admits that even non-black linemen, including Savage, Montenare, and Hadfield dug trenches also. In any event, Savage and Montenare deny that they refused training or required Plaintiff to dig additional holes and trenches. Plaintiff also admitted that Mike Poole distributed the newer white bucket trucks to his "good friends" and "fishing buddies." Such method of favoritism does not run afoul of anti-discrimination laws because it is not related to a plaintiff's membership in a protected class. See, e.g., Platner v. Cash & Thomas Contractors, Inc., 908 F.2d 902, 905 (11th Cir. 1990) (holding that "favoritism" towards friends and relatives is not a per se violation of Title VII); Blanton v. Bunch & Assocs., Inc., No. 8:04-cv-1057-T-27MAP, 2006 WL 269981, at *10 (M.D. Fla. Feb. 3, 2006) (holding that "favoritism" unrelated to plaintiff's protected class does not constitute

discrimination). Finally, the incident on November 18th in which Savage reported Plaintiff for a safety violation for not wearing gloves, was not, on its face, based on race. As to the frequency of the conduct, the submissions show that a few incidents occurred over a nearly five-year period. Although the racial epithets were offensive, such conduct, which is denied on the part of Defendant, did not rise to the level of severity needed to create a hostile work environment. Plaintiff suffered no difficulties in performing his job duties, and, in fact, was promoted to a lineman position in the expected amount of time. Moreover, the comments made were not made by his supervisor, Harris, but were made by his co-workers. The issue then becomes whether Defendant was made aware of the situation, sufficient to know of the majority of the alleged conduct. There is no question that while Plaintiff may have reported the denial of hydraulic bucket training and the fact that he never was given a new white bucket

truck to operate, the racial slurs were never reported. Plaintiff's complaint to the ethics line about Savage's quizzing on November 18th, was promptly and thoroughly investigated, thereby absolving Defendant of any vicarious liability. Based on the foregoing reasons, summary judgment for Plaintiff must be denied.

Defendant's Motion

Hostile Work Environment

Plaintiff attempts to distinguish four cases[6] relied upon by Defendant to no avail. Hostile work environment claims are "based on the cumulative effect of individual

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[6] McCann v. Tillman, 526 F.3d 1370 (11th Cir. 2008); Harrington v. Disney Regional Entm't, Inc., 276 Fed.Appx. 863, 876-877 (11th Cir. 2007) (affirming district court's grant of summary judgment for employer on hostile work environment because "ghetto" was not so severe a racial slur, particularly when plaintiff used it); Austin v. City of Montgomery, 196 Fed.Appx. 747 (11th Cir. 2006) (holding that reduction in job duties was not based on race); Barrow v. Georgia Pacific Corp., 144 Fed. Appx. 54, 57 (11th Cir. 2005) (holding that the letters KKK appearing on bathroom wall and block-saw console, use of word "nigger" three times or more a year, and noose in employee's locker, while offensive, were not so severe or pervasive to alter conditions of employment).

acts," the nature of which "involves repeated conduct." McCann, 526 F.3d at 1378 (quoting National R.R. Passenger Corp. v. Morgan, 526 U.S. 101, 114-116, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002)). In McCann, a black employee was called "girl" and the term "boy" was used in front of her once over a period of more than two years. Other racial slurs were used out of the black employee's hearing, such as "nigger" and "nigger bitch." In affirming the district court's grant of summary judgment for the employer, the Eleventh Circuit held that "[a]lthough offensive, such instances of racially derogatory language alone, extending over a period of more than two years, are too sporadic and isolated to establish that the employer's conduct was so objectively severe or pervasive as to alter the terms and conditions of her employment." McCann, 526 F.3d at 1378-79.

While the racial slurs directed at Plaintiff by a co-worker in this case—"nigger"— are severe as opposed to

the use of the term "girl" or "boy" in McCann, the number of times Plaintiff was called such from March 2002 until June 2006 does not tip the scale beyond what is considered "isolated" incidents. The most times, according to Plaintiff's testimony, that he was referred to in this manner was five or six times over the course of four years. This racial slur was never uttered in Plaintiff's presence, by his own admission.[7] Langille averred that Savage called Plaintiff "'nigger,' on more than one occasion."[8] In his deposition, Langille clarified the number of times as "probably two times, no more than three."[9] Rivera and Jankowski told Plaintiff that they had heard Savage use this racial

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[7] See Depo. of Brown at p. 91.

[8] See Affidavit of Langille at para. 6, attached to his deposition.

[9] See Depo. Of Langille at p. 29.

epithet.[10] Jankowski told Plaintiff that he had heard Savage say that he was "going to try and get that nigger fired," referring to Plaintiff.[11] Adding up the times his fellow apprentice linemen, but not Plaintiff, heard Savage use this slur, amounts to five--no more than three times by Langille, once by Rivera, and once by Jankowski. Five times in the span of four years does not rise to the level of frequency contemplated to constitute a hostile work environment.

Most importantly, Plaintiff never reported the remarks overheard by Jankowski because Plaintiff noted

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[10] See Depo. Of Brown at pp. 91 & 94.

[11] See Depo. of Brown at pp. 77-78, 92-93.

that Savage "didn't say it to me."[12] There is no indication in the record that Plaintiff reported any of the other times he heard that Savage had made racial epithets. When Plaintiff telephoned the ethics line to report and contest Savage's treatment of him on November 18, 2006, which resulted in a written reprimand and loss of one day's pay, he never reported any other incidents of harassment.[13] The questions asked by a lineman, Hadfield, referring to

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[12] See Depo. of Brown at p. 78.

[13] See Depo. of Brown at p. 53. Plaintiff also admitted there was another time he had called the ethics line because he believed he had been wrongfully sent home by Gary Riley when he showed up two days late for work with an injured elbow. See Depo. of Brown at pp. 12, 138-139. He never complained about any other incidents of harassment when he made this call.

Plaintiff's preference for eating chicken were made "a couple" of times, three at the most.[14] The reference to chicken is clearly not so severe as to necessarily constitute that contemplated for a successful claim of hostile work environment. Nevertheless, even including these comments having been made three times, the number of slurs for the four-year period totals eight, and only the comments about chicken were heard by Plaintiff himself. In any event, the slurs were made by co-workers in that Savage, Montenare, and Hadfield are not supervisors or decision-makers. Plaintiff's complaints that he was harassed based on his race because he was required to dig more holes and trenches, was denied equal time in a hydraulic bucket, and was refused the use of the newer

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[14] See Depo. of Brown at pp. 69, 93-94.

white bucket trucks, do not elevate the situation to a hostile work environment. There is no evidence that any of the alleged harassment was based on race. Plaintiff admitted that although digging trenches was the apprentices' job, everyone, including Savage, Montenare, and Hadfield, dug trenches.[15] Plaintiff's seniority and added experience made it unnecessary for him to train in the hydraulic bucket as often as the less-experienced apprentice linemen. There was no company policy regarding assignment of green or white bucket trucks, and Poole tended to give the newer trucks to his good friends and "fishing buddies."[16] As noted earlier in this order,

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[15] See Depo. of Brown at pp. 100-101 & 115.

[16] See Depo. of Brown at pp. 47-48, 56, 58 & 60.

favoritism does not violate section 1981 because it is unrelated to membership in a protected class. See, e.g., Platner; Blanton. Moreover, sending Plaintiff home after he showed up for work two days late with an injured elbow seeking light duty, is not race-based. Notably, the alleged harassment did not interfere with Plaintiff's job performance. Indeed, his promotion to lineman was unimpeded. Even assuming harassment existed, there is no evidence that Defendant should be held directly or vicariously liable to the Plaintiff. No tangible employment action was taken against Plaintiff. See Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1276 (11th Cir. 2002). Defendant had an anti-harassment policy in place, and Plaintiff did not report the majority of the harassment.

Plaintiff makes much ado about how the other apprentice linemen and linemen told him that he was being treated unfairly because he was black. Co-workers' opinions, however, are generally irrelevant to establish

discrimination or any racially-motivated intent on the part of the employer. See Matthews v. Euronet Worldwide, Inc., 271 Fed.Appx. 770, 770 (10th Cir. 2008) (holding in § 1981 employment termination case based on race discrimination, that co-workers' opinions on plaintiff's job performance have "no bearing" on supervisor's opinion of plaintiff's job performance and are therefore irrelevant; facts must be viewed as they appear to decision-maker).[17]

Failure to Train

As stated above, Plaintiff did not suffer an adverse employment action. On the contrary, he received

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[17] See also Enderwood v. Sinclair Broad. Group, Inc., 233 Fed. Appx. 793 (10th Cir. 2007) (holding in an age discrimination case that co-worker's beliefs regarding nature of e-mail sent by plaintiff was irrelevant because only employer's beliefs regarding nature and content of e-mail matters in discrimination case); Johnson v. Interstate Brands Corp., 2008 WL 3823765, at *8 (W.D. Tenn. Aug. 12, 2008) (holding in age discrimination case that co-worker's opinion that management treats younger employees more favorably than older ones is irrelevant and not evidence of pretext, citing Mauter v. Hardy Corp., 825 F.2d 1554, 1558 (11th Cir. 1987)). Mauter, 825 F.2d at 1558 (holding in age discrimination case that statement made by a retired vice president for employer that the corporation was "going to weed out the old ones" was irrelevant because retired vice president played no role in decision to terminate and statement was not based on facts).

satisfactory job performance evaluations throughout his employment and was timely promoted to the position of lineman. Thus, his failure to receive the amount of bucket training he desired did not affect a term or condition of his employment in any way. Neither can Plaintiff prove that he was treated differently from any similarly situated non-black employees. The three non-black apprentice linemen who received more time in the bucket were less experienced than he and therefore not similarly situated. Based on Plaintiff's failure to establish a prima facie case of failure to train, summary judgment must be granted in Defendant's favor.

It is therefore **ORDERED AND ADJUDGED** as follows:

(1) Defendant's Motion for Summary Judgment (Dkt. 25) is **GRANTED**.

(2) Plaintiff's Motion for Summary Judgment (Dkt. 29) is **DENIED**.

(3) The Clerk is directed to enter judgment in favor of Defendant and against Plaintiff.

(4) The Clerk is directed to close the file.

DONE AND ORDERED at Tampa, Florida, on January 28, 2009.

s/Richard A. Lazzara

RICHARD A. LAZZARA

UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM C. BROWN

Plaintiff,

v. CASE NO: 8:07-CV-1599-T-26TGW

PROGRESS ENERGY

Defendant.
/

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that Judgment is entered in Favor of the Defendant

Date: January 30, 2009 SHERYL L. LOESCH, CLERK
By: s/ B. Soto, Deputy Clerk Copies furnished to:

Counsel of Record
Unrepresented parties

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders**: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

(a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291**: Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. V. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

(b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed R Civ P. 54(b). Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

(c) **Appeals pursuant to 28 U.S.C. Section 1292(a)**: Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

(d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

(e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen V. Beneficial Indus. Loan Corp., 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n

> v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L Ed 2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed R.App P.4(a) and (c) set the following time limits.

(a) **Fed.R.App.P. 4(a)(1)**: A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.**

Special filing provisions for inmates are discussed below.

(b) **Fed.R.App.P. 4(a)(3)**: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was

filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

(c) **Fed.R.App.P.4(a)(4)**: If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

(d) **Fed.R.App.P.4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

(e) **Fed.R.App.P.4(c)**: If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

Format of the notice of appeal: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

Effect of a notice of appeal: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

[DO NOT PUBLISH]

IN THE UNITED STATES COUR OT APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-11079

D.C. Docket No. 07-01599-CV-T-26-TGW

WILLIAM C. BROWN,

Plaintiff-Appellant

Versus

PROGRESSS ENERGY,

Defendant-Appellee.

Appeal from the United States District Court
For the Middle District of Florida

(February 4, 2010)

Before TJOFLAT and BARKETT, Circuit Judges, and BARZILAY,* Judge.

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* Honorable Judith M. Barzilay, Judge of the United States Court of International Trade, sitting by designation.

PER CURIAM:

William Brown appeals an adverse summary judgment in favor of his employer, Progress Energy ("Progress"), on Brown's claims that he was subjected to a racially hostile work environment and denied training in violation of 42 U.S.C. § 1981 and the Thirteenth Amendment to the United States Constitution.[19] Brown argues that he has presented a genuine issue of material fact as to whether he was subject to a racially hostile work environment during his 2002-2006 apprenticeship as a lineman at Progress. He further contends that the district court erred as a matter of law in holding that, absent proof of a denial of promotional opportunities, he cannot

[19] Section 1981 protects an individual's right to be free from racial discrimination in the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." We analyze employment discrimination cases brought pursuant to § 1981 using the same substantive analysis as those brought pursuant to Title VII of the Civil Rights Act of 1964. Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998).

establish that Progress's failure to train him constituted an adverse employment action. Finally, Brown challenges the district court's conclusion that Progress was not vicariously liable for the hostile work environment or failure to train.[19]

We have reviewed the entire record and conclude that Brown's hostile work environment claim is based on his subjective perception and speculation rather than on specific facts from which a reasonable jury could find that he was subjected to a discriminatorily hostile work

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[19] We review de novo a district court's grant of summary judgment, applying the same legal standards as the district court. See Whatley v. CNA Ins. Cos., 189 F.3d 1310, 1313 (11th Cir. 1999). Under Federal Rule of Civil Procedure 56(c): [s]ummary judgment is appropriate if the evidence before the court shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In making this determination, the court must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment. The mere existence of some factual dispute will not defeat summary judgment unless that dispute is material to an issue affecting the outcome of the case. The relevant rules of substantive law dictate the materiality of a disputed fact. A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor. Hayes v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1995) (citation omitted).

environment because of his race.

Likewise, insufficient facts were presented with respect to Brown's failure to train claim. Although a failure to train claim is not necessarily dependent on a showing of an additional adverse employment action, the evidence presented here is insufficiently concrete to establish as a matter of fact that Brown was actually denied otherwise available training, because of his race, over the course of his apprenticeship. Rather, it is undisputed that the senior lineman about whom Brown complains was notoriously reluctant to provide training to any of the apprentices in his crew, a source of frustration to white apprentices as well.[20]

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[20] Because we have concluded that Brown has not presented a genuine issue of material fact as to his hostile work environment and failure to train claims, we do not reach the district court's alternate conclusion that Progress cannot be held vicariously liable for the

AFFIRMED.

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alleged violations.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM BROWN

Plaintiff,

Vs. Case No: 8:07-CV-1599-RAL-TGW

PROGRESS ENGERY

Defendant.
_____/

WITNESS AFFIDAVIT

COMES NOW the plaintiff's witness, WILLIAM BROWN, and states under oath, that:

1. I have personal knowledge of the matters asserted in this affidavit.

2. The information contained herein is true and accurate. The opinions that I have expressed is based upon my own observations, visual impressions and senses.

3. I was hired as a Lineman Apprentice at Progress Energy on March 11, 2002 at the Tarpon Springs Operations Center in Tarpon Springs, Florida.

4. The job duties of the Lineman Apprentice and of a Lineman at the Defendants's employment are the same as those job duties and functions listed in the Dictionary of Occupational Titles (published by the U.S. Department of Labor), and which is stated in the Second Amended Complaint. According to the Dictionary of Occupational

Titles, the Specific Vocational Preparation (SVP) necessary to qualify as a Linemen is "7" or "SVP-7," which is "Over 2 years up to and including 4 years." This is precisely the same amount of time, on average, for a Lineman Apprentice to qualify as a Lineman at Progress Energy.

5. When I arrived at Progress Energy, I was the only black or African American lineman apprentice in Tarpon Springs in 2002, out of a total of five lineman apprentices. There were five lineman on the Plaintiff's crew in Tarpon Springs, and each of the five lineman were white. I was the only black or African American on the 10-member crew in Tarpon Springs, including the Lineman Apprentices and Lineman. I was required to complete the first 18-month period of training, also called the "Orange Hat" phase, followed up by a second 18-month period, also called the "White Hat" phase." The total training period was approximately 36 months. But this training could be longer or shorter, depending upon the experience and ability of the individual. During this 36-month training period, I received positive peer reviews and supervisor reviews. I was always told that I was doing a good job.

6. I experienced discrimination and harassment, as stated in my Second Amended Complaint, the entire time that I was employed at the Tarpon Springs location. While I did not file formal written complaints, I repeatedly complained to my foreman Jeff Harris, who took no action, and advised me repeatedly to try and work things out with the Lineman on the crew. Jeff Harris knew all along that I was being discrimminated against in the terms and conditions of my employment and harassed because of my race, during the entire period of my employment at the Tarpon Springs locations.

FURTHER AFFIANT SAYETH NAUGHT

IN WITNESS WHEREOF, I, William Brown, hereby set my hand and seal this 15 day of Dec 2008.

/s/ William Brown
WILLIAM BROWN

STATE OF Florida
COUNTY OF Hillsborough

The above-signed deponent personally appeared before me on this 15 day of 2008, and proved to me on the basis of satisfactory evidence that he is the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that his signature is on this instrument. WITNESS my hand and official seal.

Linda K. Davis
NOTARY PUBLIC

LINDA K. DAVIS
Comm# DD0911678
My commission expires:
Expire 12/11/2010
Florida Notary Assn., Inc

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM BROWN

Plaintiff,

Vs: Case No: 8:07-CV-1599-RAL/TGW

PROGRESS ENGERY

Defendant.
_____/

WITNESS AFFIDAVIT

COMES NOW the plaintiff's witness, DAVID TIM, and states under oath, that:

1. I have personal knowledge of the matters asserted in this affidavit.

2. The information contained herein is true and accurate. The opinions that I have expressed is based upon my own observations, visual impressions and senses. I am not an expert in any field of advance learning, however I believe that a considerable amount of experience in the daily operations of Progress Energy as it pertains to the working conditions of William Brown.

3. My current mailing address is:
2601 Mikol Terrace South
St. Petersburg, Florida 33712
Dtim@tampabay.rr.com

4. I am black, African American.

5. I have been employed at Progress Energy since 1985. I am currently an Equipment Operator, a position that requires the operation of heavy equipment. My position requires me to work on what is called a "travel crew," which consists of one equipment operator (myself), and about 4-5 Linemen, and 4-5 Apprentices. Currently, at Progress Energy, to the best of my knowledge, there are two (2) black equipment operators out ten (10) equipment operators.

6. I have personal knowledge of disparate or discrimination treatment at Progress Energy. White employees (whether equipment operators, Linemen, or Apprentices) routinely receive more lement treatment, in terms of discipline, than African American employees. I have also personally been discriminated against because of my race.

7. BRETT SAVAGE: I have been discriminated against and harassed by Bret Savage, who is a white employee at Progress Energy, even though I have seniority over Mr. Savage. I worked with Mr. Savage for about 5 years, from 1997 to 2001. I was on the same crew with Bret Savage during that period. I remember when Bret Savage was an apprentice and when he eventually became a Lineman. Mr. Savage often spoke to me in a very dismissive, demeaning manner, even though I was senior to him in rank. I also felt that Ms. Savage was harassing me because of my race or color, whenever he spoke to me in a very demeaning manner. I never observed Mr. Savage speak to white employees or co-workers, in the same manner in which he spoke to me. After I got off of Bret Savage's crew, he continued to speak to me in the same demeaning, sarcastic manner. I also observed Mr. Savage speak to other African Americans in the same manner, although I cannot remember specific dates or times. Two other African Americans whom I observed receive rough, mean and unfair or discriminatory treatment from Bret Savage include the follow two individuals:

A. **Art Stevenson**, Lineman, black employee: I did not observe Mr. Stevenson receive any discriminatory or harassing treatment from Mr. Savage. However, I do have first hand knowledge of Mr. Stevenson's *state of mind* regarding Mr. Savage. Mr. Stevenson's state of mind was that he was very apprehensive toward Mr. Savage because he felt that Mr. Savage was racially motivated against him. (I told Art Stevenson to document and keep record of discriminatory treatment by Bret Savage and others).

B. **Curtis White**, Lineman, black employee: I did not observe Mr. White receive any discriminatory or harassing treatment from Mr. Savage. However, I do have first hand knowledge of Mr. Whites' *state of mind* regarding Mr. Savage. Mr. White's state of mind was that he was very apprehensive toward Mr. Savage because he felt that Mr. Savage was racially motivated against him.

C. Both **Art Stevenson** and **Curtis White** informed me that Bret Savage had either filed false reports on them, or told lies about their work performance. I believe that Mr. Savage had a reputation for telling lies.

8. In 2007, I spoke to William Brown about the allegations he complained filed in the U.S. District Court, regarding the problems that he encountered with Bret Savage. I told Mr. Brown that Mr.Savage has had similar problems with other African American employees.

9. I have first hand knowledge of William Brown being discriminatorily treated, with respect to truck assignments. I heard William Brown ask, "why did I get the old truck?" But they gave Marshall Harper (white employee), who was junior to William Brown, the new truck, and they gave William Brown the old truck. Later, I heard James Muma (white) told William Brown, "What the hell you going around telling other people about what's going on our crew!"

10. I spent about three months on Line Truck, on travel crew, with William Brown, at end of 2007 to 2008.

FURTHER AFFIANT SAYETH NAUGHT

IN WITNESS WHEREOF, I, David Tim, hereby set my hand and seal this 4 day of August 2008.

/s/ David Tim
DAVID TIM

STATE OF Florida
COUNTY OF Pinellas

The above signed deponent personally appeared before me on this 4th day of 2008, August and proved to me on the basis of satisfactory evidence that he is the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that his signature is on this instrument. WITNESS my hand and official seal.

/s/ Amanda Trotman
NOTARY PUBLIC

My commission expires: 7/8/2011

Amanda Trotman
Comm# DD0652845
Expires: 7/8/2011
Florida Notary Assn., Inc

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM BROWN

Plaintiff,

Vs. Case No. 8:07-CV-1599-T-24TGW

PROGRESS ENGERY

Defendant
_____ /

WITNESS AFFIDAVIT

COMES NOW the plaintiff's witness, ROBERT LANGILLE, and states under oath, that:

1. I have personal knowledge of the matters asserted in this affidavit.

2. The information contained herein is true and accurate. The opinions that I have expressed is based upon my own observations, visual impressions and senses. I am not an expert in any field of advance learning, however I believe that a considerable amount of experience in the daily operations of Progress Energy as it pertains to the working conditions of William Brown.

3. My current mailing address is:
4241 Savage Station Circle
New Port Richey, Florida 34653

4. I was hired as a Lineman Apprentice at Progress Energy about 2 weeks prior to William Brown's hire. We were Line Apprentices during the same time period on the same crew in Tarpon Springs.

5. BRET SAVAGE: During this period, the Lineman rode all of the Lineman Apprentices pretty hard; however, I did observe Bret Savage single out and ride William Brown harder than the other Lineman Apprentices. I heard Bret Savage call and (or) refer to Mr. Brown as "nigger," on more than one occasion. There was definitely some bad blood between Mr. Savage and Mr. Brown; they obviously did not get along. It appeared that Bret Savage was prejudiced against William Brown, but I am not certain that Mr. Savage is a racist. I believe that, perhaps, Mr. Savage used the word "nigger" more out of frustration than through racism. I do not know if Mr. Savage did this because of Mr. Brown's race. I did observe that Mr. Brown had his own personal life and that he did not participate in hanging out and having beers with other Lineman and Lineman Apprentices on the crew, and perhaps this was a reason that Mr. Savage singled out and rode Mr. Brown more than the other Lineman Apprentices. (I could understand why William Brown did not want to drink beer after a long day of work, out in the hot sun, and afterwards having to drive from Pasco to Hillsborough County.) I also observed that Mr. Savage had a negative influence on the other Lineman and the crew; whenever Mr. Savage was not around, everybody tended to get along. But when Mr. Savage came around, he seemed to influence the other Lineman to turn against any of the Lineman Apprentices whom Bret Savage did not like-- particularly William Brown. The other Linemen on the crew were Doug Robertson, Steve Etheridge, John Hatfield and Paul Montmar. However, Bret Savage, Paul Montmar, John Hatfield were also referred to as the "Three Amigos," and they particularly did not appear to like William Brown. They seemed to not want him on the crew.

6. TRAINING: I observed that the Linemen on the Tarpon Springs crew were unusually reluctant to train or disseminate useful information to the Linemen Apprentices, myself included. As a result, I transferred to another yard, in Seven Springs, in order to get the training that I needed. Having said that, I did observe the other apprentices receive a lot more bucket time than William Brown received. The other Apprentices, however, were senior apprentices than Mr. Brown, and so this could have been a reason for why Mr. Brown received less training. After I went to Seven Springs, I advised Mr. Brown that he should also transfer out of Tarpon Springs so that he could get the training that he needed.

FURTHER AFFIANT SAYETH NAUGHT

IN WITNESS WHEREOF, I, Robert Langille, hereby set my hand and seal this 4th day of August 2008.

/s/

Robert Langille
ROBERT LANGILLE

STATE OF Florida
COUNTY OF Pasco

The above-signed deponent personally appeared before me on this 4th day of 2008, August and proved to me on the basis of satisfactory evidence that he is the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that his signature is on this instrument. WITNESS my hand and official seal.

C.R. Ormston
NOTARY PUBLIC
/s/ Catherine Rose Ormston

My commission expires: 9/10/2010

C R ORMSTON
Comm# DD0593439
Expires 9/10/2010
Florida Notary Assn., Inc

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM BROWN

Plaintiff,

Vs. Case No:
8:07-CV-1589-RAL-TGW

PROGRESS ENGERY

Defendant
_____ _____ /

WITNESS AFFIDAVIT

COMES NOW the plaintiff's witness, MARTIN RIVERA, and states under oath, that:

1. I have personal knowledge of the matters asserted in this affidavit.

2. The information contained herein is true and accurate. The opinions that I have expressed is based upon my own observations, visual impressions and senses. I am not an expert in any field of advance learning, however I believe that a considerable amount of experience in the daily operations of Progress Energy as it pertains to the working conditions of William Brown.

3. My current mailing address is:
5185 Higate Road
Springhill, Florida 34609
ricochettrenching@gmail.com

4. I am Puerto Rican and Hispanic male.

5. I was hired October of 2005 at Seven Springs, Florida location. I am currently an Apprentice.

6. I observed Bret Savage (white male) harass William Brown. We all met up on the morning on Glen Boulevard. Mr. Brown told us that when Bret Savage shows up, he is going start messing with me. As soon as we broke off to go to our assigned spots. I was still an apprentice at that time. Mr. Brown was also an apprentice at that time. Mr. Savage walked up to Mr. Brown and started to ask him questions about measurements. Mr. Brown was at that time a senior apprentice, and yet Mr. Savage (white) started to quiz Mr. Brown in a very demeaning manner, as if to suggest that Mr. Brown did not know how to do his job. Normally, Lineman quiz the junior apprentices, not a senior apprentices who are about to get qualified. Therefore, Mr. Savage's quizzing of Mr. Brown appeared to be personal. Bret Savage seemed to have a personal vendetta against Mr. Brown. Mr. Savage had a junior apprentice Chris Glenny (white male), and yet he did not ask Chris Glenny any questions. I found this to be unusual.

7. Later that same day, when Mr. Brown started going up in the bucket, Bret Savage started to scream very loudly at Mr. Brown. Right before Mr. Brown was, with a ruler in his hands, taking measurements, Mr. Savage said, "Hey you need to have your gloves on!" Mr. Brown at that time was till in a preparatory phase, which did not yet necessitate putting on his gloves. Mr. Brown then said, "I've got on my rubber gloves, why are you coming over here to bother me, you've got your own junior apprentice," or words similar. Bret Savage asked me if Mr. Brown was in extended reach of the primary line wires. And I said no, I do not think so. And Mr. Savage retorted back at me , "Oh you would say that!" Later, Mr. Savage accused me of

being disrespectful and yelling towards him. Mr. Savage's accusation against me was false.

8. In February 2007, I overheard Bret Savage refer to William Brown a "fucking nigger." Also in February 2007, I had occasion to observe when Bill Brown got the an older truck called the "green" truck, whereas a more junior white Lineman received one of the new "white" trucks; the apprentices joked that Bill Brown did not get a white truck because he was black. Bill Brown did not get the white truck, even though it violated seniority, etc. The apprentices or Lineman stood around and asked Mr. Brown, "How did you get stuck with the Green Truck? I believe it was because your Black." And some would laugh, as though the matter was a joke.

FURTHER AFFIANT SAYETH NAUGHT

IN WITNESS WHEREOF, I, Martin Rivera, hereby set my hand and seal this 4 day of August 2008.

/s/ Martin Rivera
MARTIN RIVERA

STATE OF Florida
COUNTY OF Hernando

The above-signed deponent personally appeared before me on this 4th day of 2008, August and proved to me on the basis of satisfactory evidence that he is the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that his signature is on this instrument. WITNESS my hand and official seal.

Cassie Everett
NOTARY PUBLIC

My commission expires: 5/3/12

Cassie Everett
Comm# DD0781854
Expires: 5/3/2012
Florida Notary Assn., Inc